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ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1982

NO. 82-5868

ROBERT WAYNE WILLIAMS,

Petitioner,

VERSUS

ROSS C. MAGGIO, JR., Warden and
THE ATTORNEY GENERAL FOR THE
STATE OF LOUISIANA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

In his petition for writ of certiorari, the petitioner, Robert Wayne Williams, presents three separate questions that merit review in this Court. The petitioner asserts, inter alia, that the decision of the en banc majority in the case at bar, Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982) (Unit A) (en banc), is in direct conflict with the language and purpose of this Court's decision in Witherspoon v. Illinois, 391 U.S. 510 (1968) and its progeny. Indeed, as the petitioner explains, the prospective venireperson in this case was excluded on the basis of inquiries and responses that are explicitly proscribed by Witherspoon. In the course of this discussion, the petitioner points out that the en banc majority's analysis and conclusion regarding Witherspoon were inconsistent with those of every other court in this country, federal or state, that has considered the propriety of similar exclusions.

This supplemental brief is designed to bring to the Court's attention a recent case from the United States Court of Appeals for the Eleventh Circuit, Hance v. Zant, 696 F.2d 940 (11th Cir. 1983), which is important for two reasons: (1) it demonstrates that the Fifth and Eleventh Circuits are in conflict over the proper application of Witherspoon; and (2) it again reveals that, with the exception of the en banc majority in the present case, all federal and state courts adhere to an interpretation of Witherspoon which is consistent with the standards enunciated in that decision and other related cases of this Court.

In Hance v. Zant, supra, the prisoner challenged the exclusion of two members of the venire. The relevant inquiries and responses of one, Mrs. Melton, were as follows:

> "PROSECUTOR: No matter what the facts or circumstances of this case might be, you do not believe that you could follow the instructions of this Court to consider the death penalty and vote to impose it, is that right?
>
> MRS. MELTON: No, sir, as I said before, I feel there are times when the death penalty is warranted. I do not believe that I with my conscience could vote to impose the death penalty.

PROSECUTOR: No matter what the facts or circumstances of the case might be?

MRS. MELTON: In some case I might.

* * *

THE COURT: Let me just ask her my question too, then, are you so conscientiously opposed to capital punishment that you would not vote for the death penalty under any circumstances?

MRS. MELTON: As I said before, I believe there are circumstances where the death penalty is warranted. I do not believe that I could vote for it."

Hance v. Zant, supra, 696 F.2d at 955.

A panel of the Eleventh Circuit concluded in Hance that Mrs. Melton was improperly excused under Witherspoon because she was equivocal in her opposition to the death penalty. "In response to some questions she appeared firm about refusing to vote for the death penalty, but her responses to other questions indicated a lack of conviction." Id. at 955.

The colloquy with the other juror, Mary Turpin, was similar:

"COUNSEL: If you thought from the facts you heard in the whole case that that was the proper decision to make, that he should be electrocuted, could you vote that that was what you thought should be done?

MS. TURPIN: Well, this is hard, I don't know. I'm just too confused. I don't know.

* * * *

THE COURT: Well, what we want to find out is if he should be found guilty, after you've heard all the circumstances about this case, do you think that there is any way that you could vote to have him executed, that is, to find for the death penalty?

MS. TURPIN: Well, I guess I could.

* * * *

THE COURT: Well, that's what we need to find out whether or not you could vote for death if the circumstances of the trial, after you've learned all about it, whether or not you could, not that you would, whether you could vote to impose the death penalty?

MS. TURPIN: Well, I don't know. I just say that I don't think I could.

THE COURT: You don't think you could? I believe the juror should be excused for cause . . ."
Id. at 955.

The Eleventh Circuit held that this venireperson "was even less resolute in her feelings about the death penalty. Although her initial responses to the prosecutor's questions indicated that she would not vote for a sentence of death, upon further examination she changed her mind." Id. Because of these improper exclusions, the court of appeals concluded that Hance's sentence of death must be vacated under the compulsion of Witherspoon.

Even a cursory review of relevant portions of the voir dire in Hance and the voir dire of Ms. Brou in the case at bar, see petition at pp. 3-5, reveals that they are factually indistinguishable. In all three situations, the venire persons vacillate in their feelings about the death penalty, at one point appearing firm, but in the end revealing that they were equivocal or uncertain about their attitude. Both, Ms. Brou in the present case, and Mrs. Melton in Hance, indicate that "in some cases" they might be able to return the death penalty. (Compare petition at pp. 4-5 with Hance v. Zant, supra, 696 F.2d at 955). Both Mary Turpin in Hance and Ms. Brou conclude their voir dire with virtually identical responses: Turpin - "Well, I don't know. I just say that I don't think could"; Brou - "Well, of course, I don't know that much about the case. I always think in terms of how hideous the crime is because I don't know that much about it. I don't know. I don't think I can do it."

Indeed, the only difference between the two cases is in their result: the Eleventh Circuit followed the dictates of Witherspoon and vacated Hance's death sentence while the Fifth Circuit ignored the express language and explicit standards of this Court's decision in affirming the petitioner's death sentence. The conflict between Circuits is evident, since the Fifth and Eleventh Circuits have construed Witherspoon in indistinguishable factual circumstances in two completely different ways. A more appropriate instance for the exercise of this Court's certiorari jurisdiction is difficult to imagine, because the two Circuits

with the largest number of death cases in this country are at odds over an issue of fundamental importance to the proper administration of capital punishment: the standards for the exclusion of venirepersons during the voir dire of a capital case. This is an area where Witherspoon and related cases have set forth national standards to prevent the selection of juries that are "uncommonly willing to condemn a man to die." Witherspoon v. Illinois, supra, 391 U.S. at 521. Yet, the Fifth Circuit's interpretation will render Witherspoon a nullity in that Circuit and in every other jurisdiction which adopts the approach of the en banc majority.

Consequently, the decision in Hance reaffirms the need for this Court to grant certiorari to preserve uniformity in an area of critical national importance. The anomalous decision of the en banc majority should not be left standing or else it will be viewed as a sign that the consistent signals of this Court from Witherspoon in 1968 to Adams v. Texas, 466 U.S. 38 in 1980 can be ignored with impunity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this date served a copy of the foregoing supplemental brief upon the respondents, by depositing a copy of the same in the United States Mail, first class and postage prepared, to Honorable Kay Kirkpatrick, Assistant District Attorney, 222 St. Louis Street, Baton Rouge, Louisiana, and to Honorable William J. Guste, Attorney General of the State of Louisiana, 234 Loyola Avenue, Seventh Floor, New Orleans, Louisiana 70112. All parties required to be served have been served.

RICHARD E. SHAPIRO

Dated: Feb. 28, 1983